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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D. C. 20536

PUBLIC COPY

APR 01 2003

File: SRC 03 068 50028 Office: Texas Service Center Date:

IN RE: Petitioner:
Beneficiaries:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER: Self-represented

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

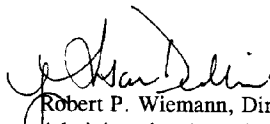
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the Director, Texas Service Center, who certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed.

The record indicates that the petitioner is a landscape contractor. The petitioner desires to employ the beneficiaries as laborers for three and one-half months. The certifying officer of the Department of Labor (DOL) declined to issue a labor certification because the petitioner had not established a temporary need for these workers. The director determined that the petitioner had established that sufficient countervailing evidence had been submitted to establish that qualified persons in the United States were not available and that the positions offered are temporary.

Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii), defines an H-2B temporary worker as:

an alien...having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country, but this clause shall not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession....

Matter of Artee Corp., 18 I&N Dec. 366 (Comm. 1982), codified in current regulations at 8 C.F.R. § 214.2(h)(6)(ii), specified that the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. It is the nature of the need, not the nature of the duties, that is controlling. See 55 Fed. Reg. 2616 (1990).

As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor must be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. 8 C.F.R. § 214.2(h)(6)(ii)(B). The petition indicates that the employment is seasonal and that the temporary need recurs annually.

The regulation at 8 C.F.R. § 214.2(h)(6)(ii)(B)(2) states that for the nature of the petitioner's need to be seasonal, the petitioner must establish that the services or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The petitioner shall specify the period(s) of time during

each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees.

The nontechnical description of the job on the Application for Alien Employment Certification (Form ETA 750) reads:

Transplants established trees and shrubs in landscape under close full supervision during the cool months. Digs holes, places plants and trees, back fills holes. Stake trees, waters using hosing. Overtime potential.

The Department of Labor (DOL) did not issue the temporary labor certification because the petitioner has filed two applications for workers to perform services from February 15, 2002 through December 15, 2002, and again from December 1, 2002 through March 15, 2003. These applications combined, extend the petitioner's need for temporary workers into a continuous period of one year. However, the need for the laborers on this petition is for the transplanting of plants and trees during the dormant season (winter months) from December 1, 2002 through March 15, 2003. Therefore, the petitioner has been shown to have a seasonal need for workers during this time period and the duties and need for the laborers on the previous application have not been shown to be essentially the same. Consequently, the petitioner's need for the services of the beneficiaries has been shown to be temporary.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden.

ORDER: The director's decision is affirmed. The petition is approved.